

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

with affidavit

77-6088

111 B

To be argued by
LESLIE R. BENNETT

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-6088

ISRAEL MILLS

Plaintiff-Appellant,

—v.—

CITY OF NEW YORK,

Defendant,

—and—

DONALD E. JOHNSON, or his successor,
Veterans Administration,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6088

ISRAEL MILLSAP,

Plaintiff-Appellant,

—v.—

CITY OF NEW YORK,

Defendant,

—and—

DONALD E. JOHNSON, or his successor,
Veterans Administration,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE

Preliminary Statement

Appellant Israel Millsap ("Millsap") brings this appeal *pro se*, from a memorandum opinion and order of the Honorable Charles S. Haight, United States District Judge of the Southern District of New York. The opinion, which was filed May 2, 1977, is not reported but is reproduced in the Appendix to Appellee's Brief ("appendix") (A-126-32).

Issues Presented for Review

1. Did the District Court have subject matter jurisdiction to consider the claim for relief raised in Millsap's complaint?

2. Did the judgment entered against Millsap in a prior action, *Israel Millsap v. Donald E. Johnson, Administrator of Veterans Affairs*, 72 Civ. 4418 (SJR), bar this action on grounds of *res judicata*?

Statement of the Case

This *pro se* action was commenced in the Supreme Court for the State of New York, County of New York, by service of a summons and complaint upon the Veterans Administration ("VA") on September 30, 1975.

Millsap alleged in his complaint that the VA sold him real property located at 665 E. 165th Street, Bronx, New York ("the 165th Street property"),¹ that the VA knew prior to the sale that the building on that property was subject to demolition by the City of New York, and that the VA did not inform Millsap that the building was about to be demolished (A-9-10). Millsap sought damages against the VA in the sum of \$15,000 and against the City of New York in the sum of \$25,000. Service was apparently never effected on the City, as it has not appeared in this litigation.

By Petition for Removal filed in the United States District Court for the Southern District of New York on October 20, 1975, and Notice of Removal filed in the Supreme Court of the State of New York, County of New York, on October 21, 1975, the VA removed the action to the United States District Court. The VA filed an answer on November 6, 1975, and, on January 14, 1976, moved to dismiss the complaint on the ground that Millsap's claim was barred by the *res judicata* effect of the judg-

¹ Although the complaint refers to property at "655 E 75th Street", without reference to a borough, it is apparent that Millsap was referring to the 165th Street property. See, e.g., Millsap's January 20, 1976 affidavit filed herein (A-48).

ment entered against Millsap in *Israel Millsap v. Donald E. Johnson, Administrator of Veterans Affairs*, 72 Civ. 4418 (SJR) ("the first action"). On February 9, 1976, the Honorable Lawrence W. Pierce, United States District Judge for the Southern District of New York, to whom this case was first assigned, denied the VA's motion.

On July 7, 1976, the VA filed another motion to dismiss the complaint, this time on the ground that the District Court lacked subject matter jurisdiction to hear Millsap's claim.² In a memorandum and order filed July 29, 1977 by Judge Haight, to whom the case had been reassigned, the District Court reserved decision on the jurisdictional issue, directing the parties to submit additional memoranda addressed to this question.

On August 19, 1976, the VA filed a supplemental memorandum of law in support of its motion to dismiss on the jurisdictional ground, and by memorandum opinion and order filed May 2, 1977, the District Court granted the motion. Judge Haight concluded that the complaint charged the VA with conduct which constituted "wilful and deceitful withholding of information, with the intent to cause economic injury to plaintiff" (A-130), that such allegations sounded in tort under the rubric of deceit, misrepresentation or interference with contract rights and that the Court lacked jurisdiction to hear these allegations under the doctrine of sovereign immunity and the explicit provisions of 28 U.S.C. § 2630(h).

Millsap filed a notice of appeal from the District Court's opinion and order on May 4, 1977. Pursuant to a June 10, 1977 scheduling order, August 9, 1977 was set

² The motion also sought, alternatively, a protective order against proposed depositions of two VA employees. This aspect of the motion is not relevant to this appeal, and, therefore, will not be discussed herein.

as the date for the filing of Millsap's brief on appeal and the joint appendix. Since Millsap had not filed either his brief or the joint appendix by that date, Millsap's appeal was dismissed by order of the Clerk of the United States Court of Appeals for the Second Circuit filed September 8, 1977. Subsequently, Millsap moved for permission to docket this appeal out of time. In his affidavit submitted in support of that motion, he stated that he did not file his brief or the joint appendix because the official court record of this case had been lost,³ and the Clerk's Office for the

³ Since neither the District Court nor this Court has been able to locate the official record of this case, and no appendix was filed by Millsap, the VA requested, and was given permission to file an appendix by order of this Court dated January 5, 1978. The appendix which is being filed herewith consists of all documents listed in the Index to the Record on Appeal and the accompanying certificate prepared by the Clerk of the District Court, to the extent that such documents have been maintained by the office of the United States Attorney in its file for this matter, or if not so maintained, to the extent that such documents were obtainable from the District Court's microfilm or general files. Unless otherwise noted herein, all documents appearing in the appendix are copies of documents maintained by the office of the United States Attorney as the "office copy" in the legal file relating to this case.

In a number of instances, the "office copy" of certain documents or portions thereof were substantially illegible. Three methods have been employed to remedy this problem. (1) Where a clearer copy was available from another part of the office file, this document has been inserted directly following the "problem" document in the appendix. (2) Where the document was available from the District Court's microfilm or other files (such as an order or opinion), the copy obtained from the District Court has been inserted directly following the "problem" document. (3) Where a clearer copy or District Court copy of a document was not available, which was the case with respect to two handwritten documents submitted by Millsap in the course of this litigation, a typed version of the readable and legible portions of these documents was inserted.

[Footnote continued on following page]

Court of Appeals had advised him to wait until the record was found. This Court granted Millsap's motion by order filed October 3, 1977.

Statement of Facts

In April of 1972, Millsap contracted to purchase the 165th Street property from the VA. The contract of sale clearly specified that the property was being sold "as is", without any warranties, either express or implied, on the part of the VA (A-68-69).

ments has been prepared and inserted directly following the "problem" document. Documents handled in accordance with one of these three alternative methods are as follows: Report of United States Magistrate Harold J. Raby dated June 2, 1975 (A-25-34); Millsap's complaint in the first action (the official court records of this case have also been lost) (A-64-65); Millsap's contract of sale with the VA for the 165th Street property (A-66-69); Millsap's brief to the Court of Appeals in the first action (A-70-75); Millsap's affidavit submitted to the Court of Appeals in the first action (A-76-77); decision of the Court of Appeals in the first action (A-78-79); Millsap's second submission to the Court of Appeals in the first action (A-80-84); Judge Pierce's endorsement order, filed February 9, 1976, denying the VA's motion to dismiss this action on *res judicata* grounds (A-85-92; also A-50-53).

The Pre-Trial Order of Judge Haight dated July 6, 1976 (noted on the Index to the Record on Appeal as "Pre-Trial Order of Judge Stewart" but listed on the District Court docket sheet as Judge Haight's Pre-Trial Order) was obtained from the Clerk of the District Court, since a copy of this document could not be found in the files of the United States Attorney's Office relating to this case.

Finally, copies of two items listed as "missing" in the District Court Clerk's certificate (A-2), i.e., Millsap's discovery motions filed, respectively, on November 19, 1975 and April 14, 1976, were found in the files of the United States Attorney's Office relating to this case and have been reproduced in the appendix (A-17 and A-58).

By complaint served on October 26, 1972, Millsap brought the first action against the VA relating to the 165th Street property and to two other properties which Millsap had either purchased or contracted for (*Millsap v. Johnson*, 72 Civ. 4418 (SJR)). The sole allegations in the complaint with respect to the 165th Street property were:

1. On May 5th, 1972 I purchased a piece of property at 665 East 165th Street, Bronx, New York. I never saw this property until I bought it and my man did not report to me until July 1972. There are liens and violations all over the building and it is not fit for human beings to live in and I cannot get it fixed up. I am unable to get a loan on the building. Please instruct Arby A. Halpern to fix up this building and remove all liens and find another building that is suitable for me to rent to people to live.

(A-22). The VA moved for summary judgment on the ground that the properties were sold on an "as is" basis. The motion was granted by the Honorable Sylvester J. Ryan pursuant to an endorsement order dated February 6, 1974 (A-23). The order specifically provided that "[t]he complaint is dismissed *on the merits*." (Emphasis added.) Judgment was entered accordingly (A-24). Millsap did not appeal.

Over a year later, on May 8, 1975, Millsap filed a motion "to reopen" the first action based upon the demolition by New York City of the buildings located on property sold to him by the VA, including the 165th Street property. Judge Ryan referred the motion to United States Magistrate Harold J. Raby who prepared a report dated June 2, 1975 (A-30-34). Magistrate Raby viewed Millsap's motion to reopen as a motion under Rule 60(b) of the Federal Rules of Civil Procedure. The Magistrate noted that Millsap had provided no reason for seeking

the requested relief "other than the claim that the Veterans Administration defrauded" him (A-30). Magistrate Raby further noted that "this is the very issue that your Honor previously disposed of in granting summary judgment in favor of the Government" (A-31). Finding that the prerequisites for relief under Rule 60(b) had not been met, the Magistrate recommended denial of the motion. Judge Ryan denied the motion on June 24, 1975.

On July 15, 1975, plaintiff filed a notice of appeal from Judge Ryan's *February, 1974 decision*. On September 11, 1975, the VA moved to dismiss the appeal as untimely.⁴ By order dated October 9, 1975, this Court granted the VA's motion to dismiss the appeal to the extent that the appeal was taken from the February, 1974 order. In addition, the Court construed the appeal to be from the June 24, 1975 order denying the motion to reopen, and, consequently, denied the motion to dismiss the appeal to the extent that it related to the latter order. By order dated April 16, 1976, this Court affirmed the District Court's June 24, 1975 order.

As noted above, at pp. 2-3, the instant action alleges that the VA defrauded Millsap because the 165th Street property was sold to him without informing him that the building on the property was under demolition. The VA first moved to dismiss on *res judicata* grounds, but Judge Pierce denied the motion by endorsement order filed February 6, 1974 (A-50-53). The VA then moved to dismiss on the ground that the District Court lacked subject matter jurisdiction to hear this action. Judge Haight granted the motion by memorandum opinion and order filed May 2, 1977 (A-126-32).

The VA contends on this appeal that the action of the

⁴ This case was initiated on September 30, 1975 while the appeal in the first action was still pending.

District Court dismissing the complaint in this action was proper because (1) the District Court lacked subject matter jurisdiction to hear this action and (2) this action was barred under principles of *res judicata*.⁵

ARGUMENT

POINT I

The District Court Lacked Subject Matter Jurisdiction to Hear Millsap's Complaint.

In its opinion dismissing the complaint in this action, the District Court held that it lacked subject matter jurisdiction to hear Millsap's claim, relying upon the doctrine of sovereign immunity and the explicit bar of 28 U.S.C. § 2680(h) (A-130-32). There can be no doubt that this decision was correct.

The essence of Millsap's claim, as derived from the allegations made in his complaint, is that the VA sold him the 165th Street property with the knowledge that this property was to be demolished by the City of New York and that it did not inform him of the prospective demolition. As found by the District Court, these allegations clearly "sound in tort", as they constitute charges of fraudulent or deceitful conduct. See, e.g., *Miller Harness Co. v. United States*, 241 F.2d 781 (2d Cir. 1957); *Jones v. United States*, 207 F.2d 563 (2d Cir. 1953), *cert. denied*, 347 U.S. 921 (1954).⁶

⁵ In his brief on appeal, Millsap requests a remand for a trial in the District Court. Remand is inappropriate, because on a motion to dismiss a complaint (such as the motions to dismiss herein), the facts as alleged in the complaint are deemed to be true for purposes of the motion.

⁶ As the District Court correctly found, this is not a contract action, and, accordingly, there was no subject matter jurisdiction under 28 U.S.C. § 1346(a)(2) to hear Millsap's claim herein.

The United States, as the real party in interest herein,⁷ can be sued only with its consent, and then only in accordance with the strict terms of such consent. *United States v. Testan*, 424 U.S. 392 (1976); *Soriano v. United States*, 352 U.S. 270 (1957); *United States v. Sherwood*, 312 U.S. 584 (1941). The Federal Tort Claims Act ("the Act"), 28 U.S.C. §§ 1346(b) and 2671 *et seq.*, provides the basis for the consent of the United States to suit for actions sounding in tort. While the Act sets forth an explicit waiver of sovereign immunity, the Act also sets forth explicit exceptions to its application. Among the types of actions specifically excepted from the consent of the United States to suit for actions sounding in tort are those described in 28 U.S.C. § 2680(h):

Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation*, *deceit or interference with contract rights*: . . .
[Emphasis added.]

The jurisdictional bar to actions against the United States raising claims proscribed by section 2680(h) has been consistently upheld. *United States v. Neustadt*, 366 U.S. 696 (1961); *Blitz v. Boog*, 328 F.2d 596 (2d Cir.), *cert. denied*, 379 U.S. 855 (1964); *Anglo-American and Overseas Corp. v. United States*, 242 F.2d 236 (2d Cir. 1957); *Miller Harness Co. v. United States*, *supra*; *Jones*

⁷ Although Donald E. Johnson or his successor as Administrator of Veterans Affairs is the named defendant, no claim is asserted against the Administrator in his individual capacity. Clearly, the action is against the United States as the real party in interest, and pursuant to the Federal Tort Claims Act the United States is the proper party defendant in such suits sounding in tort against its agencies or any of its officers or employees while acting within the scope of their employment. 28 U.S.C. §§ 1346(b) and 2679(a).

v. *United States, supra*; *Modular Technics Corp. v. South Haven Housing Development Fund Co.*, 403 F. Supp. 204 (E.D.N.Y. 1975), *aff'd*, 538 F.2d 311 (2d Cir. 1976); *Sanchez Tapia v. United States*, 227 F. Supp. 35 (S.D. N.Y.), *aff'd*, 338 F.2d 416 (2d Cir. 1964), *cert. denied*, 380 U.S. 957 (1965). Since Millsap's claim herein falls within the specific exceptions contained in section 2680 (h), the District Court properly found that it lacked subject matter jurisdiction to hear the complaint (A-130-32), and the complaint was properly dismissed.⁸

POINT II

Millsap's Claim Is Barred Under the Doctrine of *Res Judicata*.

An independent basis for affirming the dismissal of Millsap's action herein is that this action is barred under the doctrine of *res judicata* by virtue of Judge Ryan's February 6, 1974 order granting summary judgment against Millsap, "on the merits," in the first action. Although Judge Pierce ruled that *res judicata* was inapplicable under the circumstances presented herein (A-50-53), the VA respectfully contends that Judge Pierce's ruling was erroneous and that the doctrine is fully applicable.⁹

The purpose, nature and scope of the doctrine were recently summarized by this Court in *Expert Electric*,

⁸ Even if Millsap's claim were cognizable under the Federal Tort Claims Act, he has never filed an administrative claim as required by 28 U.S.C. § 2675(a).

⁹ Judge Pierce's decision constituted an interlocutory decision which may now be challenged on appeal from the final decree of the District Court. See 9 J. Moore, *Federal Practice* ¶ 110.08[2], at 113-15; ¶ 110.18, at 205-07 (2d ed. 1975); and cases cited therein.

Inc. v. Levine, 554 F.2d 1227, 1232-33 (2d Cir. 1977), petition for cert. filed, 45 U.S.L.W. 3055 (U.S., August 8, 1977):

[T]he doctrine of res judicata, judicial in origin, was established for the primary purpose of avoiding repetitive litigation of the same causes of action. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1933). Briefly stated, the parties to an action in which a judgment on the merits has been rendered, or their privies, are barred from re-litigating the same cause of action in a second proceeding. *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 (1876); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 319, 47 S.Ct. 600, 602, 71 L.Ed. 1069 (1927); *McNellis v. First Federal Savings and Loan Association of Rochester, New York*, 364 F.2d 251, 254 (2d Cir.), cert. denied, 385 U.S. 970, 87 S.Ct. 504, 17 L.Ed. 2d 434 (1966); *Saylor v. Lindsley*, 391 F.2d 965, 968 (2d Cir. 1968). There must be an identity of parties and identity of issues between the prior and subsequent suits before operation of the res judicata doctrine is triggered. Where a subsequent suit is based on a different cause of action, the principle of collateral estoppel renders the prior judgment conclusive only as to matters necessarily litigated and determined in the prior proceeding. *Southern Pacific Railroad Co. v. United States*, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27, 42 L.Ed. 355 (1897); *Commissioner of Internal Revenue v. Sunnen*, supra, 333 U.S. at 597-98, 68 S.Ct. at 719; *McNellis v. First Federal Savings and Loan Association of Rochester, New York*, supra, at 254.

Millsap's first action and this action were both brought against Donald E. Johnson, Administrator of Veterans

Affairs, Veterans Administration.¹⁰ Thus, the requirement that the two actions be between the same parties has been met.

The VA contends that this action constitutes the same "cause of action" which was raised and dismissed "on the merits" in the first action. In both actions, Millsap has raised a claim concerning the 165th Street property. This property was sold to Millsap on an "as is" basis with no warranties pursuant to a contract of sale between Millsap and the VA (A-68-69). In the first action, Millsap alleged that "[t]here are liens and violations all over the building" (A-22). The allegation of demolition in this action raises no new "cause of action" or issue for purposes of the doctrine of *res judicata*. Millsap's cause of action against the VA concerns the VA's "failure" to advise him of defects in the property sold to him. That he claims to have learned only in May, 1975¹¹ that the property was under demolition makes no difference to the basic nature of his claim that the VA sold him property without informing him of defects in it. See *Stuhl v. Tauro*, 476 F.2d 233, 234 (1st Cir. 1973); *Matthews v. Wolvin*, 266 F.2d 722, 726 (5th Cir. 1959); *Estevez v. Nabers*, 219 F.2d 321, 323 (5th Cir. 1955); *Lester v. National Broadcasting Co.*, 217 F.2d 399, 400 (9th Cir. 1954), *cert. denied*, 348 U.S. 954 (1955). The new event cited by Millsap, *i.e.*, the fact of demolition, "created no new dispute," *Estevez v. Nabers*, *supra*, 219 F.2d at 323, since "the operative wrong remains the same," *Astron Industrial Associates, Inc. v. Chrysler Motors Corp.*, 405 F.2d 958, 962 (5th Cir. 1968). Assuming *arguendo* that Millsap's complaint herein constitutes a valid claim against the VA, the added fact of demolition is at most

¹⁰ The fact that this second action also named New York City as a defendant is irrelevant.

¹¹ This is the date of his motion to reopen the first action, in which he asserted that the property "had violations" and was "under demolition". See A-30.

an added damage factor, and does not change the nature of the cause of action.

The decision in *United States v. Wooten*, 343 F.2d 214 (5th Cir. 1965), principally relied upon by Judge Pierce in denying the VA's motion to dismiss, is distinguishable. In *Wooten*, the court noted that the first action was brought against "J. J. Wooten d/b/a Atlanta-Alabama Motor Lines, Inc.", whereas the second action was solely against "J. J. Wooten." The court emphasized the fact that the prior action was dismissed, following a motion for judgment on the pleadings, on the sole ground that a stockholder is not liable for the debts of the corporation. *Id.* at 216. The second action was brought against Wooten individually on the basis of new facts learned by the Government, specifically that Wooten had assumed the assets and obligations of the corporation in question. The court also stressed that the critical issues relating to the merits of the Government's action against Wooten had never been litigated, and, accordingly, held that *res judicata* did not bar the second action. Judge Ryan's order granting summary judgment against Millsap disposed of Millsap's claim *on the merits*, and "the merits" are unchanged by the additional fact of demolition.¹²

Finally, the fact that the "as is" nature of the sale formed the basis for the VA's motion for summary judgment in the first action, while Millsap's present action seems to be premised upon a tort theory of fraud or misrepresentation is an immaterial difference for purposes of the application of *res judicata* principles. Although Millsap never put forth a legal theory of his case in the first action,¹³ it is clear that a litigant cannot split up his

¹² It is worthy of note that Magistrate Raby did not view the added allegation of demolition as constituting a new cause of action. See A-30-31.

¹³ He did, however, refer to the "fraud" of the VA in his motion to reopen the first action. See A-30.

cause of action and sue upon different legal theories, *e.g.*, contract and tort, in independent actions. *See, e.g., Expert Electric, Inc. v. Levine, supra*, 554 F.2d at 1234; *Sanchez v. Caribbean Carriers Ltd.*, 552 F.2d 70, 72-73 (2d Cir. 1977); *Schmieder v. Hall*, 545 F.2d 768, 771 (2d Cir. 1976), *cert. denied*, 430 U.S. 955 (1977); *Moreno v. Marbil Productions, Inc.*, 296 F.2d 543 (2d Cir. 1961); *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 295 F.2d 362 (5th Cir. 1961); *Williamson v. Columbia Gas & Electric Corp.*, 186 F.2d 464, 469-70 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951); *Saylor v. Lindsley*, 274 F. Supp. 253 (S.D.N.Y. 1967), *rev'd on other grounds*, 391 F.2d 965 (2d Cir. 1968); *Mathews v. New York Racing Association, Inc.*, 193 F. Supp. 293 (S.D.N.Y. 1961); 1B J. Moore, Federal Practice, ¶ 0.410 [1], at 1154 (2d ed. 1974). He is bound to assert all of his legal theories relating to the particular "cause of action" in question in one action. Moreover, the fact that Millsap is proceeding *pro se* does not bar the application of the doctrine. *Mathews v. New York Racing Association, Inc., supra*, 193 F. Supp. at 295. As Justice Frankfurter stated in *Angel v. Bullington*, 330 U.S. 183, 192-93 (1947):

The doctrine of *res judicata* reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. . . . And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties. . . .

CONCLUSION

The District Court's decision to dismiss the complaint should be affirmed.

Dated: New York, New York
January 11, 1978

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline P. Troia being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the

11th day of January 19 78 she served a copy of the
within Appellee's Brief

by placing the same in a properly postpaid franked envelope
addressed:

Israel Millsap
9537 Prairie Avenue South
Chicago, Illinois 60628

And deponent further
says s he sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse Annex,
One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Pauline P. Troia

11th day of January, 19 78

Lawrence Mason
Notary Public, State of New York
Qualified in Dutchess County
Commission Expires March 30, 1979

